REMARKS

This Application has been carefully reviewed in light of the Final Office Action mailed July 28, 2005 ("Office Action"). Claims 1-32 are pending in the present application and currently stand rejected.

Section 103 Rejections

Claims 1-32 were rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 6,519,703 issued to Joyce ("*Joyce*") in view of an Alleged Admission of Prior Art (*AAPA*).[1] Applicants respectfully traverse the rejections.

Independent Claim 1 is allowable because the proposed combination of *Joyce* and *AAPA* fails to diclose at least the following limitations:

> selecting a fastest one of the malicious code detection methods;
> analyzing computer code for malicious code using the selected malicious code detection method;
> determining a probability of accuracy of a result of the analysis;
> selecting a next fastest one of the malicious code detection methods and repeating the analyzing and determining steps, if the probability of accuracy is below a predetermined level

(Emphasis Added.) Of the above limitations, the Final Office Action acknowledged that *Joyce* did not disclose, teach, or suggest "selecting a fastest one of the malicious code detection methods, analyzing computer code for malicious code using the selected malicious code detection method; selecting a next fastest one of the malicious code detection method." Office Action, Page 4. Rather, the Office Action relies on the AAPA to disclose these limitations. However, this is incorrect. Assuming for the sake of argument that the AAPA is prior art, Applicants submit that the AAPA does not disclose *selecting* a fastest one of the malicious code detection methods, *analyzing* computer code for malicious code using the *selected* malicious code detection method, and *selecting* a next fastest one of the malicious code detection methods. Rather, the AAPA simply introduces the concept that "[d]ifferent hueristic detection methods may require different amounts of time and/or utilize varying amount of computer resources." Page 2 of

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[1] The AAPA cited in the Office Action is the section entitled "Description of the Related Art" in the Application.

Application. This recitation simply does not disclose the above-referenced limitation in Independent Claim 1. With respect to these limitations, the Office Action simply states:

> . . . AAPA disclose at least some of the malicious detection methods require different amounts of time to analyze for malicious code; selecting a fastest one of the malicious code detection methods, analyzing computer code for malicious code using the selected malicious code detection method; selecting a next fastest one of the malicious code detection methods (see page 1 and 2 of specification).

(Office Action, Page 4.) But, as described above, all of these limitations *are not* disclosed in the AAPA. Accordingly, for at least this reason, Applicants submit that Independent Claim 1 and its dependents, Claims 2-6, are allowable. Independent Claims 7, 13, 19, 25, 26, 27, 28, 29, 30, 31, and 32 are allowable for analogous reasons as are their dependents, Claims 8-12, 14-18, and 20-24.

Independent Claim 1 is further allowable because the proposed combination of *Joyce* and *AAPA* fails to disclose *repeating the analyzing and determining steps* if the probability of accuracy is below a predetermined level. With regards to this limitation, the Final Office Action cites *Column* 2, lines 42-65 and the Abstract of *Joyce*. However, this is incorrect. In these sections, *Joyce* does not disclose *repeating the analyzing and determining steps*. With reference to *Joyce's* FIGURE 1 and Column 2, *Joyce* describes a system in which data packets 22 undergo a hueristic analysis stage 16. Based upon the hueristic analysis stage 16, the data packets 22 are assigned a confidence level. If they have a "high-confidence," they are released to a traditional firewall rule base 12. If they have a "marginal-confidence," they are release into a more complex firewall rules base 14. If they have a "poor-confience," they are shunted out of firewall 10A. In this portion of *Joyce*, no disclosure is made as to an *additional* determination of a probability of accuracy of a result of an additional analysis. Accordingly, for at least this additional reason, Applicants submit that Independent Claim 1 and its dependents, Claims 2-6, when *viewed as a whole* are allowable. Independent Claims 7, 13, 19, 25, 26, 27, 28, 29, 30, 31, and 32 are allowable for analogous reasons as are their dependents, Claims 8-12, 14-18, and 20-24.

Notwithstanding the above reasons for allowance, many of the dependent claims are also allowable because the combined references fails to teach or suggest the additional limitation or limitations recited by respective dependent claims. An example is described below.

Claim 5 is allowable because the combined references fail to disclose prompting a user to input a value to be used as the predetermined level. With regards to this limitation, the Final Office Action merely points to *Joyce*, Column 2, lines 42-65. However, this portion of *Joyce* makes no disclosure of prompting a user, let alone, prompting a user to input a value to be used as the predetermined level. For at least this additional reason, Claim 5 and its dependent, Claim 6, are allowable. Claims 11, 17, 23, and their dependents, Claims 12, 18, and 24 are allowable for analogous reasons.

Applicant's additionally challenge the Final Office Action's alleged motivation to combine and modify features from the proposed references. The entirety of this alleged motivation is a follows:

> It would have been obvious to one of ordinary skill in the art at the time the invention was made to utilize AAPA's prior art disclosure in Joyce's Heuristic packet filter analysis *in order to provide different methods based on Hueristic's logic based rules*.

(Office Action, Page 4, emphasis added.) The Final Office Action acknowledges that *Joyce* does not disclose "wherein at least some of the malicious code detection methods require different amounts of time to analyze for code, selecting a fastest one of the malicious code detection methods, analyzing computer code for malicious code using the selected malicious code detection method; selecting a next fastest one of the malicious code detection method." Office Action, Page 4. Accordingly, at a minimum, prior art references would need to suggest a desirability in combining the above limitations with *Joyce*. The conclusory reasoning provided above simply does not meet this requirement. Accordingly, the *required evidence* of a motivation to combine and/or modify prior art references is lacking. *See Ex Part O'Donnell*, Appeal No. 2004-0421 (The Board found that the Examiner's reason, "it would have been within the scope of one of ordinary skill in the art to combine the teachings of applicant's admitted prior art and [patent reference]

to achieve further corrosion resistance," an inadequate reason as to why there is a motivation to combine the references.).

To this end, a reminder is given that the mere fact that references _can_ be combined or modified does not render the resultant combination obvious unless the _prior art_ also _suggests_ the _desirability_ of the combination. _See, e.g., In Re Jones_, 958 F.2d 347, 351, 21 U.S.P.Q.2d 1941, 1944 (Fed. Cir. 1992) ("Conspicuously missing from this record is any evidence, other than the PTO's speculation (if that can be called evidence) that one of ordinary skill in the herbicidal art would have been motivated to make the modification of the prior art salts necessary to arrive at the claimed...salt."). Further, "[t]he factual inquiry whether to combine references must be thorough and searching." (_In re Sang-Su Lee_, 277 F.3d 1338, 1343). "[An] examiner's conclusory statements . . . do not adequately address the issue of motivation to combine." _Id._ Furthermore, simple hindsight speculation that "it would have been obvious" to make the proposed combination is insufficient under M.P.E.P.[2] guidelines and governing Federal Circuit case law.[3] Moreover, such statements and assumptions are inadequate to support a finding of motivation, which is a factual question that cannot be resolved on "subjective belief and unknown authority."[4]

Should a rejection based on any of the above asserted rejections be maintained, Applicants respectfully request appropriate evidentiary support. Additionally, if the Examiner is relying upon "common knowledge" or "well known" principles to establish

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[2] _See, e.g.,_ M.P.E.P. §2145 X.C. ("The Federal Circuit has produced a number of decisions overturning obviousness rejections due to a lack of suggestion in the prior art of the desirability of combining references.").

[3] For example, in _In re Dembiczak_, 175 F.3d 994 (Fed. Cir. 1999), the Federal Circuit reversed a finding of obviousness by the Board of Patent Appeals and Interferences, explaining that evidence of a suggestion, teaching, or motivation to combine is essential to avoid impermissible hindsight reconstruction of an applicant's invention:

> Our case law makes clear that the best defense against the subtle but powerful attraction of hindsight obviousness analysis is _rigorous application of the requirement for a showing of the teaching or motivation to combine prior art references._ Combining prior art references without evidence of such a suggestion, teaching, or motivation simply takes the inventor's disclosure as a blueprint for piecing together the prior art to defeat patentability—the essence of hindsight.

175 F.3d at 999 (quoting _W.L. Gore & Assoc., Inv. v. Garlock, Inc._, 721 F.2d 1540, 1553 (Fed. Cir. 1983)) (emphasis added) (citations omitted).

[4] _See In re Lee_, 277 F.3d 1338, 1344 (Fed. Cir. 2002).

the rejection, Applicants request that a reference be provided in support of this position pursuant to M.P.E.P. § 2144.03. Furthermore, to the extent that the Examiner maintains any rejection based on an "Official Notice" or other information within the Examiner's personal knowledge, Applicants respectfully request that the Examiner cite a reference as documentary evidence in support of this position or provide an affidavit in accordance with M.P.E.P. § 2144.03 and 37 C.F.R. 1.104(d)(2).
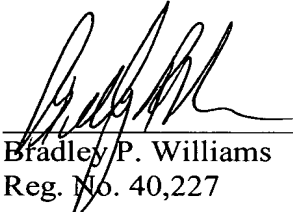
CONCLUSION

Applicants have made an earnest attempt to place this case in condition for allowance. For the foregoing reasons, and for other reasons clearly apparent, Applicants respectfully request full allowance of all pending claims.

If the Examiner feels that a telephone conference would advance prosecution of this Application in any manner, the Examiner is invited to contact Brad P. Williams, Attorney for Applicants, at the Examiner's convenience at (214) 953-6447.

Although no fees are believed due, the Commissioner is hereby authorized to charge any fees or credit any overpayments to Deposit Account No. 02-0384 of Baker Botts L.L.P.

Respectfully submitted,

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